STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2011
v	No. 295020 Wayne Circuit Court
EALTON TYRONE WILLIAMSON, Defendant-Appellant.	LC No. 2008-014216-FH

Before: K. F. KELLY, P.J., AND GLEICHER AND STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a bench trial of one count of manufacture of marijuana, MCL 333.7401(2)(d)(*iii*), and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was acquitted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). Defendant was sentenced to serve a mandatory two-year prison term for the felony-firearm conviction, and a concurrent thirty days probation for the manufacture of marijuana conviction. We affirm.

Defendant was arrested after he was seen by police running off from a Detroit home at which the police were executing a search warrant. An officer assigned to secure the rear of the home testified that when defendant saw him, defendant ran back toward the home and threw a handgun to the ground. After defendant was detained, the police found six sandwich baggies of suspected marijuana, additional empty baggies and a digital scale on a coffee table in the living room of the home. The police also confiscated several marijuana plants growing in the backyard. Seven other persons found inside the home were arrested, including Vandalyn White.

Defendant first argues that insufficient evidence was adduced to support his felony-firearm conviction. We review this argument de novo, *People v Sherman-Huffman*, 241 Mich App 254, 265; 615 NW2d 776 (2000), considering the evidence in the light most favorable to the prosecution in order to determine "whether any rational fact-finder could have found that the essential elements of the crime were proved beyond a reasonable doubt," *People v Shipley*, 256 Mich App at 374-375, citing *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

The focal point of defendant's argument is when the felony underlying the felony-firearm conviction was committed. "The felony-firearm statute proscribes the carrying or possession of a firearm during the commission or attempted commission of any felony." *People v Etchison*, 123 Mich App 448, 452; 333 NW2d 309 (1983). Defendant was convicted of aiding and

abetting the manufacture of marijuana. Defendant maintains this offense was complete as soon as he gave White permission to grow the marijuana in the backyard of the residence, and contends plaintiff would have to prove he possessed a firearm at that moment. The prosecution argues that the permission was never rescinded and continued to operate through the day he was arrested at the home. In order to convict a person of aiding and abetting the commission of a crime, the prosecution must establish the following:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999), habeas corpus granted on other grounds, *Harris v Booker*, ___ F Supp 2d ___ (ED Mich, 2010) (alteration by *Moore* Court).]

The process of "manufacturing" marijuana includes the germinating and growing of marijuana plants and is a continuing process, thus making it an ongoing crime. See *People v Stumpf*, 196 Mich App 218, 226; 492 NW2d 795 (1992). When defendant gave White permission to grow the plants, defendant was not committing a transitory act. His authorization was ongoing and thus applied to White's future actions. Defendant's continued activity at the residence after he moved out of it was evidence of his continued participation in the manufacture and distribution of marijuana.. The felony-firearm conviction was therefore supported.

Defendant also argues that the court erred in denying his motion for new trial, which was based on newly discovered evidence. The evidence brought to the court's attention in support of the motion was a notice to quit which terminated defendant's tenancy in the residence in issue as of August 13, 2007. A trial court's factual findings regarding a motion for new trial based on newly discovered evidence are reviewed for clear error, and its decision on the merits is reviewed for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

> A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. [*Id*.]

Although the evidence cited by defendant, the notice to quit, was newly presented to the court, it was not newly discovered. The notice was addressed to defendant, his father, and all occupants of the residence. Defendant testified that he did not leave the residence until spring 2008, so it is reasonable to assume he had knowledge of the termination notice. Clearly, he could have "discovered" this evidence with due diligence. Moreover, to the extent it supports his

assertion that he was not living at the residence at the time of his arrest, the notice is merely cumulative. Finally, the evidence is not such as to render a different trial outcome.[1]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens

[1] In order for the document to have the desired impact, the court would have to have presumed that defendant left in fall 2007, and that that the marijuana could not survive the winter. The first presumption is contrary to defendant's trial testimony. Indeed, the notice provides support for the court's conclusion that defendant was a holdover tenant. As for the second, assuming it is true that marijuana does not germinate and cannot survive the winter, there is nothing to prevent a person from transplanting the plants to the inside of the residence for the winter months.